2694

No. 12927

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

See Vol 2693

ANN SHERIDAN,

Plaintiff, Appellee and Cross-Appellant,

vs.

RKO RADIO PICTURES, INC., a Delaware corporation,

Defendant, Appellant and Cross-Appellee.

CROSS-APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

Plaintiff and cross-appellant herein, Ann Sheridan, for convenience herein referred to as "Sheridan," a resident of California, is an actress engaged in the motion picture industry. Defendant and cross-appellee, RKO Radio Pictures, Inc., for convenience herein referred to as "RKO," is a Delaware corporation, engaged in the business of producing and distributing motion pictures.

The action was commenced in the United States District Court, Southern District of California, Central Division. The complaint was for damages for breach of contract. An amended complaint was subsequently filed for damages for breach of contract consisting of two

causes of action. [R. 3.] The alternative and second cause of action was subsequently stricken and the cause went to trial on the first cause of action, in which Sheridan sought damages of $350,000 for breach of contract by RKO.

RKO, in its answer, alleged breach of contract by Sheridan and requested an award of damages in a counterclaim. [R. 17.]

The contract, dated April 29, 1949, for convenience referred to as "the contract," was admitted in evidence as Plaintiff's Exhibit 1. [R. 86.]

A pre-trial stipulation and order of court was executed on January 30, 1951, which for convenience is referred to as "the pre-trial order." [R. 40.]

It was stipulated and the District Court declared that jurisdiction existed on the basis of diversity of citizenship under 28 U. S. C. A., Section 1332. [Pretrial order, R. 42.] This court has jurisdiction under 28 U. S. C. A., Section 1291. RKO filed its notice of appeal on March 6, 1951. [R. 77.] Sheridan filed her notice of appeal [R. 78], statement of points to be relied upon on appeal [R. 621] and designation of portions of the record on March 7, 1951. [R. 623.]

After a trial before a jury a verdict was rendered in favor of Sheridan and against RKO in the sum of $50,000, plus interest in the sum of $5,162.42. [R. 74.] The District Court entered a judgment in favor of Sheridan and against RKO in the sum of $55,162.42, together with

costs in the sum of $968.42, making a total of $56,130.84. [R. 75.]

The verdict of the jury was an adjudication that RKO had breached its employment contract with Sheridan. This verdict and the judgment based thereon is in that respect entirely favorable to Sheridan. Sheridan is not appealing from the judgment in so far as it holds that RKO was guilty of breach of contract and that Sheridan performed her part of the contract. Sheridan seeks a reversal and a new trial only on the damage issue as to whether Sheridan is entitled to damages in excess of $50,000.00, plus interest, and on that issue only.

Complaint is made of erroneous rulings of the District Court in the pre-trial order and at the trial (1) in interpreting the contract, (2) in excluding proffered evidence as to the meaning of the phrase "minimum compensation" and as to the proper measure of damages, and (3) in refusing to give the jury appropriate instructions requested by Sheridan, as a result of which the judgment in favor of Sheridan and against RKO was limited to the sum of $50,000, exclusive of interest. It is the position of Sheridan that once the liability of RKO for breach of contract was fixed, in the absence of the aforementioned erroneous rulings, the verdict should and would have been in favor of Sheridan and against RKO for a sum in excess of $150,000.

Statement of the Case.

A. Statement of the Facts.

Sheridan, in 1948, entered into negotiations with Polan Banks for Sheridan to portray the leading female role in a motion picture to be produced by Polan Banks based upon his novel "Carriage Entrance." The terms and conditions of the proposed contract were reduced to writing, but not executed.

Polan Banks, through a corporation controlled by him, known as Polan Banks Productions, Inc., had negotiated with RKO for financing and distributing the picture "Carriage Entrance." A contract was entered into between RKO and Polan Banks Productions, Inc. Subsequently a suit was filed by Polan Banks Productions, Inc. against RKO for damages on account of breach of that contract.

The litigation between Polan Banks Productions, Inc. and RKO was settled by an agreement under which RKO took over from Polan Banks and from Polan Banks Productions, Inc. what was designated as a "package" which included the story and script for the picture "Carriage Entrance," the producer, Polan Banks, the artist who would portray the leading female role, Ann Sheridan, and the actor who would portray the leading male role, Robert Young. [Pre-trial order, III, items 14, 15, 16 and 17, R. 40.]

On April 29, 1949, Sheridan and RKO executed the written contract which is the basis of this litigation. [R. 86.] (For the court's convenience relevant portions of the written contract are printed on pages 1 to 17 of the appendix to this brief.)

The document bears the heading RKO Radio Pictures, Inc. preceding the word agreement. In Paragraph 1 RKO employed Sheridan to portray the leading female role in "Carriage Entrance." [App. p. 1.] Paragraph 4 specified that the term of employment was to commence no later than July 6, 1949. [App. p. 2.]

Compensation for Sheridan's services was thoroughly covered in Paragraph 6 consisting of more than two typewritten pages. [App. pp. 2 to 7.]

For Sheridan's services during the first 15 weeks of the term RKO agreed as follows:

> "* * * to pay * * * the sum of One Hundred Fifty Thousand Dollars ($150,000.00) (One Hundred Thousand Dollars ($100,000.00) of which shall be deferred and payable only from the gross receipts of the Picture * * *) said One Hundred Fifty Thousand Dollars ($150,000.00) being hereinafter called 'the flat compensation,' plus a sum (herein called the 'percentage compensation') equal to ten percent (10%) of the net profits derived * * * from the distribution of CARRIAGE ENTRANCE * * *."

The time and manner of payment was then stated:

> "(a) Fifty Thousand Dollars ($50,000.00) on account of the flat compensation on the first regular weekly payday after the principal photography of CARRIAGE ENTRANCE has commenced, but in no event later than the seventh day after such photography has commenced;
>
> (b) The balance of the flat compensation, to-wit: One Hundred Thousand Dollars ($100,000.00) thereof, shall be deferred and shall be paid to Artist only from the gross receipts of CARRIAGE ENTRANCE accruing during the period of ten (10) years from

and after the first general release of CARRIAGE ENTRANCE in the United States, and otherwise at the time and in the manner hereinafter set forth;"

Subdivision (c) deals with the computation of the percentage compensation. Subdivision (d) deals with the time and manner of payment of that portion of the flat compensation which is deferred.

The next to last paragraph of this clause states that the "compensation hereinbefore specified shall constitute payment in full for Artist's services only if the term of Artist's employment hereunder does not exceed fifteen (15) consecutive weeks." For time beyond 15 weeks RKO agreed to pay Sheridan "salary * * * at the rate of Ten Thousand Dollars ($10,000.00) per week."

The contract and attached exhibit consisted of 14 pages which included 33 numbered paragraphs. The lengthy contract was almost entirely devoted to protecting the interests of the employer, RKO.

Sheridan commenced the rendition of services and the term of her employment began on July 6, 1949. Between that date and August 17, 1949, Sheridan rendered all services required of her under the contract; such services consisted of meetings with the costume designer with reference to sketches for wardrobe to be used by Sheridan in the picture; in the fitting of 14 costumes; in discussion of make-up and hair dress with employees of RKO; in conferences and discussions with RKO executives concerning the screenplay and male actors discussed as possible substitutes for Robert Young who had originally been approved by Sheridan for the leading male role; examination of film of proposed sub-

stitutes for Robert Young. [R. 91-94, 96-98, 99-100, 101-102, 114-116, 117-122, 123-125, 126-128, 128-131.]

RKO, on August 17, 1949, notified Sheridan in writing that it would not utilize her services in the picture "Carriage Entrance" and would not pay her any compensation whatsoever in connection therewith. This written notice is Plaintiff's Exhibit 6. [R. 135.] The verdict of the jury was a determination that RKO's termination of the employment contract with Sheridan was a wrongful discharge without cause or justification.

RKO did produce the motion picture entitled "Carriage Entrance." Principal photography of "Carriage Entrance" was commenced by RKO on October 3, 1949, and was completed on November 16, 1949. RKO used the services of Ava Gardner to portray the leading female role in said picture in place of Sheridan, and used Robert Mitchum as a substitute for Robert Young to portray the leading male role in the picture. RKO had refused to assign Robert Mitchum when requested by Sheridan prior to her discharge. [Pre-trial order, III, items 10, 11 and 12, R. 40; R. 127.]

The application of the wrong measure of damages by the District Court resulted from the erroneous application by the District Court of the first sentence of Paragraph 29 of the contract, for convenience herein referred to as "the first sentence," which reads as follows:

> "Producer shall not be required to use Artist's services hereunder, or to complete the production of CARRIAGE ENTRANCE, and shall be deemed to have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder." [App. p. 12.]

B. Questions Involved.

Actually, only one question is involved, and that is as to the proper measure of damages once the jury determined that RKO had broken its employment contract with Sheridan.

However, the answer to this question requires consideration of two other questions:

1. Did the District Court err in limiting Sheridan's damages to $50,000 by reason of its holding that the first sentence of Paragraph 29 was applicable?

2. Did the District Court err, (a) in failing to interpret minimum compensation to mean $150,000, or in the alternative, (b) in excluding parol evidence of the surrounding circumstances to show the meaning of minimum compensation to be $150,000?

If the first question is answered in the affirmative so that the first sentence is held never to have become operative, then the second question need not be considered since such a determination should result in a direction to the District Court for a retrial on the issue of damages in excess of the amount awarded Sheridan.

On the other hand, should the first sentence be held to have been operative, then the second question may nevertheless require a reversal on the issue of damages if it is held that parol evidence should have been admitted in order to permit a determination of the meaning of the phrase "minimum compensation" to be $150,000 rather than $50,000. However, a ruling by this Court that "minimum compensation" meant $150,000 is also possible, in which event judgment may be ordered for Sheridan in the correct amount.

SUPPLEMENT TO SPECIFICATION OF ERROR NO. 4.

Plaintiff's Instruction No. 6.

[R. 50-52.]

"If you find that plaintiff is entitled to a verdict pursuant to the instructions I have given you, then you must determine the damages plaintiff has suffered as a direct and proximate result of defendant's wrongful act.

"The contract provided that plaintiff was to receive two main types of compensation:

"1. Flat compensation in the sum of $150,000.00, of which $50,000.00 was to be paid to plaintiff one week after commencement of principal photography of the motion picture 'Carriage Entrance' and the balance of which, in the sum of $100,000.00, was to be paid to plaintiff out of the 'gross receipts' of the picture, as this term is defined in the agreement.

"2. In addition, plaintiff was to receive 10% of the net profits of the picture.

"The verdict for plaintiff should compensate her for both elements of her compensation.

"You are not to be concerned with the first sentence of paragraph 29 of the agreement between plaintiff and defendant or the meaning of 'minimum compensation,' but you should consider whether, from all of the evidence, the picture would have earned sufficient gross receipts so that plaintiff would have received not merely the sum of $50,000.00 which was payable one week after commencement of principal photography of the picture 'Carriage Entrance,' but instead the entire flat compensation amounting to $150,000.00. In addition, you should also estimate the probable value of plaintiff's 10% interest in the

net profits of the picture assuming that such picture had been produced and distributed with plaintiff as the female star, as provided by the contract.

"You need not be concerned with the fact that there is no absolute certainty as to the amount of the gross receipts which the picture would have earned if it had been produced and distributed with plaintiff as the female star but you should make a just and reasonable estimate based upon all of the evidence as to whether it was probable that the picture, if so produced and distributed, would have earned sufficient gross receipts so that under the contract, plaintiff would have received the entire flat compensation of $150,000.00.

"Similarly, you must decide, based upon your just and reasonable estimate of the probable costs and earnings of such picture, if the picture would have earned net profits and if so, you must also decide how much plaintiff's 10% interest in such net profits would probably have amounted to.

"The verdict for plaintiff should compensate her for all damage she has suffered by reason of defendant's acts, including the damage based upon her flat compensation and the damage measured by her percentage interest in the net profits of the picture."

Plaintiff's Instruction No. 6 (Alternate).
[R. 52-55.]

"(This instruction is requested only if plaintiff's instruction No. 6 is refused.)

"If you find that plaintiff is entitled to a verdict pursuant to the instructions I have given you, then in arriving at the measure of the damages directly and proximately caused by defendant's wrongful act, you

will render a verdict for plaintitff in the amount of the 'minimum compensation,' unless you find that defendant has waived its right to rely on the first sentence of paragraph 29 of the contract.

"The word 'Waiver' in law means an intentional relinquishment of a known right and you will consider whether the Notice of Termination to plaintiff dated August 17, 1949, stating that by reason of plaintiff's failure to approve an actor to portray the leading male role in the picture, defendant would not use plaintiff's services and would not pay plaintiff any compensation, constituted an intentional relinquishment on the part of the defendant of its right to 'be deemed to have fully performed by paying to plaintiff the minimum compensation.' If you find that defendant has waived its right to rely on this first sentence of paragraph 29, then in arriving at the damages suffered by plaintiff you will pay no consideration to paragraph 29 but you will consider what plaintiff would have received under the contract if the picture had been made with plaintiff in the leading female role.

"The contract provided that plaintiff was to receive two main types of compensation:

"1. Flat compensation in the sum of $150,000.00, of which $50,000 was to be paid to plaintiff one week after commencement of principal photography of the motion picture 'Carriage Entrance' and the balance of which, in the sum of $100,000.00, was to be paid to plaintiff out of the 'gross receipts' of the picture, as this term is defined in the agreement.

"2. In addition, plaintiff was to receive 10% of the net profits of the picture.

"The verdict for plaintiff should compensate her for both elements of her compensation.

"If you find that defendant waived its right to rely on the first sentence of paragraph 29 of the agreement, you must consider whether, from all of the evidence, the picture would have earned sufficient gross receipts so that plaintiff would have received not merely the sum of $50,000.00 which was payable one week after commencement of principal photography of the picture 'Carriage Entrance,' but instead the entire flat compensation amounting to $150,000.00. In addition, you should also estimate the probable value of plaintiff's 10% interest in the net profits of the picture assuming that such picture had been produced and distributed with plaintiff as the female star, as provided by the contract.

"You need not be concerned with the fact that there is no absolute certainty as to the amount of the gross receipts which the picture would have earned if it had been produced and distributed with plaintiff as the female star but you should make a just and reasonable estimate based upon all of the evidence as to whether it was probable that the picture, if so produced and distributed, would have earned sufficient gross receipts so that under the contract, plaintiff would have received the entire flat compensation of $150,000.00.

"Similarly, you must decide, based upon your just and reasonable estimate of the probable costs and earnings of such picture, whether the picture would have earned net profits and if so, you must also decide how much plaintiff's 10% interest in such net profits would probably amount to."

Plaintiff's Instruction No. 6 (2nd Alternate) [R. 55-56].

"(This instruction is requested only if plaintiff's instruction No. 6 is refused. If plaintiff's instruction No. 6 (Alternate) is also given, this instruction is requested with the addition of the portions enclosed in parentheses.)

"If you find that plaintiff is entitled to a verdict, then I instruct you that the first sentence of paragraph 29 is applicable and that your verdict for plaintiff must be in the amount of the 'minimum compensation' (unless you find that defendant has waived its right to rely on the first sentence of paragraph 29, in accordance with my previous instruction to you).

"I have considered this phrase and have determined that it is ambiguous and, accordingly, it is up to you to decide from all of the evidence you have heard what these words mean with reference to the provisions of the contract and particularly whether they mean $50,000.00, the compensation payable one week after commencement of principal photography, as contended by defendant, or whether they mean the entire flat compensation of $150,000, but exclusive of the percentage compensation, as contended by plaintiff. In reaching your decision as to the meaning of the phrase 'minimum compensation,' you must consider the evidence presented as to the usage in the motion picture industry, the testimony as to the circumstances surrounding the execution of the contract, and in view of the evidence that the defendant undertook the employment contract with plaintiff as part of a settlement of litigation with Polan Banks and a corporation controlled by him, you must also consider the language as it was understood by plaintiff and Polan Banks, as originally negotiated."

The grounds of Sheridan's objections to the Court's refusal to adopt Sheridan's theory of the case were not repeated in connection with making objections to the Court's jury instructions and the Court's refusal to give instructions requested by Sheridan. With permission of the District Court, and in the interest of saving the Court's time, counsel for Sheridan stated the objections to the jury instructions by incorporating the pre-trial record by reference thereto. [R. 575, 605.]

During the pre-trial proceedings Sheridan proposed certain issues to be considered at the trial of the action, which rulings were excluded by pre-trial rulings of law made by the District Court. These issues proposed by Sheridan and excluded by the District Court, and the District Court's rulings of law were set forth in the Pre-Trial Stipulation and Order and made a part of the record of the trial of the action. [R. 46-49.] Set forth below is the applicable portion of the Pre-Trial Stipulation and Order:

"IV.

"Issues Proposed by Plaintiff and Excluded by Rulings of the Court.

"1. What is the meaning of the phrase 'minimum compensation' in the first sentence of Paragraph 29 of the Contract?

"At the trial plaintiff will question the witnesses with reference to the meaning of the phrase 'minimum compensation'; objections to such questions will be

made by defendant; the court will sustain defendant's objections. The plaintiff will then make an offer of proof of the evidence which would have been produced by plaintiff had the court not made its ruling.

"2. Did the first sentence of Paragraph 29 of the Contract become operative?

"Plaintiff contended that the first sentence of Paragraph 29 never became operative; that defendant elected not to take advantage of the provisions thereof if defendant had such right since defendant's notice of termination of August 17, 1949, was an election by defendant; that assuming defendant had the right to rely on the first sentence of Paragraph 29, defendant did not do so since defendant did not pay or offer to pay plaintiff the sum of $50,000 or any other sum whatever.

"3. On the question of damages, plaintiff contended that plaintiff should be permitted to introduce evidence of damages in the amount of $150,000.00, plus 10% of the profits which the picture would have earned if defendant had not breached the contract.

"At the trial plaintiff will question the witnesses with reference to the damages sustained by plaintiff; objections to such questions will be made by defendant; the court will sustain defendant's objections. The plaintiff will then make an offer of proof of the evidence which would have been produced by plaintiff had the court not made its ruling.

"V.

"Rulings of Law by the Court.

"In connection with the foregoing matters, the court has ruled as a matter of law as follows:

"1. That Paragraph 29 of the Contract, and particularly the first sentence thereof, is to be interpreted so that the sentence be considered as an integral part of the whole contract and that the obligation of defendant, if any, could be liquidated by the payment of 'minimum compensation.'

"2. That the second phrase in the first sentence of Paragraph 29 reading, 'or to complete the production of "Carriage Entrance"' should have added to it the phrase 'with the artist' and is to be read as though said phrase appeared in the Contract.

"3. That the phrase 'minimum compensation' as it appears in the Contract is not so ambiguous as to meaning so as to make it necessary to go outside of the four corners of the Contract to ascertain the meaning of the words and the court states as a matter of law that the phrase 'minimum compensation' means $50,000.00.

"4. That defendant at all times had a right to rely on the first sentence of Paragraph 29 of the Contract and to fully perform its obligations by paying 'minimum compensation' and that such right was available to defendant at all times.

"5. That the first sentence of Paragraph 29 of the Contract does not contain such contractual obligations so that only by the payment of the minimum

compensation can the defendant avail itself of that portion of the Contract.

"The court having ruled as aforesaid, it is hereby ordered that this pre-trial order and all of the matters and things set forth herein, including the rulings of the court, and the reporter's transcript of the pre-trial proceedings, shall be made a part of the record of this trial and shall serve as a portion of the original record upon any appeal which may be taken."

Counsel for Sheridan also objected to the instructions given to the jury and the refusal to give instructions requested by Sheridan on the ground "that under the uncontradicted evidence Paragraph 29 never became operative, either as to the first sentence or second sentence, because on the uncontradicted facts the plaintiff did approve an actor to play the leading male role, and did render services." [R. 575-576, 605.]

The answer to these questions involves a consideration of whether the District Court erred in excluding the issues proposed by Sheridan which are set forth in Section IV of the pre-trial order [R. 40]; in excluding evidence offered by Sheridan at the trial on such issues [R. 104-112] and in refusing to give Sheridan's requested instructions 6, 6 alternate and 6 second alternate, dealing with what Sheridan proposed as the proper measure of damages. [R. 50-56.]

C. Specification of Errors Relied Upon.

1. The District Court erred in holding and declaring that the first sentence limited Sheridan's recovery to the sum of $50,000. [Pre-trial order, V, items 1 and 3, R. 40.]

2. The District Court erred in holding that the phrase "minimum compensation" was not so ambiguous as to permit the introduction of parol evidence by Sheridan to explain the meaning of the phrase. [Pre-trial order, V, item 3, R. 40; Offer of proof, R. 104.]

3. The District Court erred in excluding evidence as to the damages Sheridan suffered by reason of RKO's breach of the contract over and above the sum of $50,000. [Pre-trial order, IV, item 3, R. 40; Offer of proof, R. 111.]

4. The District Court erred in refusing to give to the jury Sheridan's requested instructions 6, 6 alternate and 6 second alternate, all dealing with the measure of damages. [R. 50.]

ARGUMENT.

I.

Paragraph 29 Did Not Limit Damages to $50,000.

A. The First Sentence of Paragraph 29 Was Not Operative on August 17, 1949.

Throughout the pre-trial hearings and at the trial itself, Sheridan contended that the first sentence was not available to RKO on August 17, 1949; further, that RKO had elected not to take advantage of the provisions thereof if RKO had such right. [Pre-trial order, IV, item 2, R. 40.]

The question of election will be discussed subsequently. In this portion of the brief, it is Sheridan's position that the District Court erroneously applied the contract, drafted in its final form by the Legal Department of RKO, against Sheridan and in favor of RKO.

There were two contingencies under which RKO could make use of the first sentence:

1. If RKO did not use Sheridan's services under the contract.

On the undisputed facts, RKO did use Sheridan's services under the contract from July 6 to August 16, 1949.

2. If RKO did not complete the production of CARRIAGE ENTRANCE.

RKO did complete the production of "Carriage Entrance."

The first sentence was in the disjunctive and only in the event of the occurrence of one of the two contingencies could it become operative. The language did not

mean that RKO in the absence of either contingency might pay less than full compensation and be relieved of its obligations under the contract. It did mean that it might secure the protection of partial performance instead of full performance if either of the express contingencies actually occurred.

It may serve a useful purpose to consider, at this point, the objectives RKO sought by this clause.

There is a line of cases dealing with the employment of actors under which courts have held that there is an implied covenant to use the actor's services. These cases have permitted the recovery of damages for breach of such implied covenant over and above the amount of compensation that the actor was entitled to receive. Typical of such cases is the Australian case of *White v. Australian and New Zealand Theatres, Ltd.* (1943), 67 The Commonwealth Law Reports 266, 17 The Australian Law Journal 30.

The Australian court expressed the principle in the following quotation:

> "Under a contract of this character the employer is not only bound to pay the remuneration agreed upon, but is also under an obligation to afford an opportunity to the persons employed to exercise and display their talents. *Marbe v. George Edwardes (Daly's Theatre) Ltd.* (1928), 1 K. B. 269; *Clayton and Waller v. Oliver* (1930), A. C. 209."

See:

Kramer v. Wolfe Cigar Stores Co. (Tex., 1906), 91 S. W. 775;

Sigmon v. Goldstone (1906), 101 N. Y. Supp. 984.

The first phrase of the first sentence was specifically designed to eliminate such liability.

The second phrase gives RKO the right to abandon the production. In the absence of such a clause the employee not only might have a claim by virtue of the breach of the implied covenant to make use of her services, but her actual claim for money under the contract would not be limited to any stipulated amount but would subject the employer to liability for the percentage compensation.

A party to a contract may not voluntarily put it out of his power to do what he has agreed to do. If the party does disable himself from performing, these cases hold that it is a breach of contract.

Wolf v. Marsh (1880), 54 Cal. 228, is a case of this nature. The court there held that defendant was liable on an agreement to pay moneys due under a note providing for payment out of profits even though defendant had sold the coal mine, the profits of which were to be devoted to such payment.

Accord:

Macgregor v. Union Life Insurance Co. of Omaha (1903), 121 Fed. 493.

The second phrase is, therefore, designed to give RKO, the employer, the contractual right, without liability for damages, to disable itself from performing its part of the contract by abandoning the production of the picture.

The court below, in order to give RKO the protection of the first sentence was required to and did read it to include language not written in the contract.

Since it was beyond dispute that RKO had made use of Sheridan's services under the contract from July 6 to August 16, 1949, the court read into the first sentence two additional requirements:

(a) That the services described in the first sentence meant the services of Sheridan in the actual photography of the picture; and

(b) That the completion of production meant the completion of the production "with Ann Sheridan."

As applied by the District Court, the first sentence was read as though it had been written:

> "Producer shall not be required to use Artist's services hereunder in *the photography of* CARRIAGE ENTRANCE, or to complete the production of CARRIAGE ENTRANCE *with Ann Sheridan* * * *." (Emphasis supplied on added words.)

The interpolation of the additional words by the court was made entirely without the benefit of parol evidence of any kind whatever. The court looked at the contract and in order to give RKO the benefit thereof added the two phrases without which the plain language of the contract as written would have been of no avail to RKO.

> *Stockton v. Girsh* (1951), 36 A. C. 634, 227 P. 2d 1; Cal. Code Civ. Proc., Sec. 1858.

The first sentence is clearly a provision introduced solely for the benefit of the employer, RKO.

> *Mears Heel Co. v. Walley* (1934), 71 F. 2d 876.

By no process of imagination can that clause be read as one of any benefit to the employee, Sheridan. In the

absence of any evidence other than the language in question, it is submitted that the contract should have been read as written. In any event, language should not have been added so as to permit a construction or interpretation of the contract adverse to the interest of Sheridan.

The ruling of the District Court did violence to one of the fundamental concepts of interpretation. Courts should not adopt constructions of contracts which will work forfeitures, permit injustice, or place one party at the mercy of the other.

> *Wood Motor Co. v. Nebel* (Texas, 1950), 232 S. W. 2d 772, 776).

Attention should be directed to Paragraphs 20, 21 and 23 [App. pp. 8 to 11; 11 to 12] of the contract where RKO made specific provision for its inability to use the services of Sheridan for reasons beyond its control. Paragraph 20 is a lengthy exposition of *force majeure* under which RKO might be excused of all liability; Paragraph 21, even more lengthy, is an excuse from performance occasioned by the incapacity or illness of Sheridan, as well as by reason of breach of contract on her part; and finally, Paragraph 23 is the so-called morality clause giving RKO an additional right to terminate the contract without liability for breach of that particular provision.

The first sentence was an additional provision supplying a further contractual right to be exercised voluntarily by RKO. It gives RKO the contractual right to substitute another actress for Miss Sheridan *before* making use of her services under the contract. (Emphasis added.) It gave RKO the additional right even though it had commenced making use of Miss Sheridan's services under the

contract to abandon the production of the picture. The general intent of the contract was, however, to use Sheridan in the picture.

A primary rule of construction is to give effect to the intention of the parties as it existed at the time of the execution of the contract.

Cal. Civ. Code, Sec. 1650;

Pacific Portland Cement Co. v. Food Mach. & Chem. Corp. (1949), 178 F. 2d 541.

There is no uncertainty in the language here under scrutiny. The first clause absolves RKO of an obligation "to use the services of Artist hereunder." The word "hereunder" refers to the contract. The second clause quite clearly gave RKO the right to abandon the production of the picture. The court should have applied the contract as written.

Cal. Civ. Code, Sec. 1638.

Even if there were uncertainty, it is a settled rule in such cases that the contract is construed most strongly against the party who caused the uncertainty to exist—the party drafting the instrument, in this case, RKO.

Cal. Civ. Code, Sec. 1654;

Taylor v. J. B. Hill Co. (1948), 31 Cal. 2d 373, 189 P. 2d 258;

Maryland Casualty Co. v. I. A. C. (1918), 178 Cal. 491, 173 Pac. 993.

On the undisputed and uncontradicted facts, RKO never became entitled to the benefit of the first sentence because it did use Sheridan's services under the contract

up to and including August 16, 1949, and it did complete the production of "Carriage Entrance." Neither contingency provided for in the first sentence ever became effective so as to confer on RKO the contractual right to meet its obligations to Sheridan by paying to Sheridan the minimum compensation referred to in that first sentence, whatever meaning may be ascribed to the phrase.

B. RKO Elected Not to Rely on the First Sentence of Paragraph 29.

(1) RKO Did Not Pay Minimum Compensation on August 17, 1949.

Assuming for argument's sake that by interpolation, construction and interpretation RKO was entitled to the benefits of either of the contingencies provided for in the first sentence, RKO deliberately and voluntarily failed to take advantage thereof. Only in the event of the occurrence of one of the two contingencies was RKO given the privilege of performing its obligations by paying minimum compensation instead of full compensation. We will, for this portion of our brief, assume that one such event did occur.

Even then, RKO failed to perform as permitted by the first sentence. It did not pay, offer to pay, or tender payment to Sheridan of minimum compensation, or any compensation at all. By the notice of August 17, 1949, it expressly refused to perform that portion of the contract, assuming that partial performance might have been permitted.

There is a vast difference between the payment of minimum compensation on August 17, 1949, and the payment of minimum compensation in 1951 or later un-

der the compulsion of a judgment. The difference in income tax rates alone is a source of considerable loss to Sheridan. It cannot be said to have been within the contemplation of the parties that Sheridan would have to engage lawyers and go through the time, trouble and expense of a trial in order to obtain the minimum compensation which the language said would be paid if RKO exercised the contractual right it had obtained. Sheridan's promise to accept less than full performance by RKO as provided in Paragraph 6 of the contract, was conditioned on prompt performance by RKO of its reciprocal promise to pay minimum compensation if RKO desired to take advantage of Sheridan's promise in Paragraph 29.

Alderson v. Houston (1908), 154 Cal. 1, 10, 13;
Restatement, Contracts, Secs. 251, 266, 267;
Cal. Civ. Code, Secs. 1437, 1439.

In order to achieve the result given by the District Court's ruling, it was necessary to read the last phrase in Paragraph 29 as follows:

> "and shall be deemed to have fully performed by paying Artist the minimum compensation herein provided for, *not when specified in the contract but years later, if RKO fails in convincing a judge or jury that RKO is not required to pay anything whatever to Sheridan.*" (Emphasis supplied on added material.)

It is one thing to accept less than full performance as performance under the contract. It is an entirely different thing to require Sheridan to accept less than full performance after there has been a breach of the contract.

It is unfair to permit RKO to gamble on the result of a law suit and if and when it loses give it the benefit of performance although it has been adjudged guilty of a breach of contract.

It is unreasonable to hold Sheridan to performance after RKO has been adjudged guilty of breach of the contract.

It is inconsistent to hold that the contract is still in effect and RKO may still perform after a jury has rendered a verdict that RKO has broken the contract. A contract cannot be broken for one purpose and be maintained intact for another.

> *Alder v. Drudis* (1947), 30 Cal. 2d 335, 182 P. 2d 195.

RKO having secured the extremely favorable contractual privilege provided in the first sentence was, on August 17, 1949, in a position by its voluntary act to limit its liability to minimum compensation. However, in order to do so, RKO was required to pay or tender payment to Sheridan of minimum compensation. The failure of RKO to do so was a failure of consideration for the promise of Sheridan to accept less than full performance and Sheridan was discharged of her duty to perform her promise.

> Restatement, Contracts, Sec. 274, Comment c, p. 402.

This is an appropriate place to dispose of the case of *Lorentz v. RKO Radio Pictures, Inc.* (1946), 155 F. 2d 84. That case, on the language of the contract in question and on its facts, is not in point. The clause there

was expressly stated to be a waiver and release of all claims or causes of action and read as follows:

> "The Producer expressly waives and releases the Corporation from all claims or causes of action based on the failure of the Corporation actually to utilize the services of the Producer or the results thereof, or on the failure of the Corporation to produce or to release or to continue the distribution of the Pictures; provided, however, that nothing contained in this Article of this agreement shall be deemed to relieve the Corporation of its obligation to pay the Producer the fixed compensation payable to him pursuant to Article 1 of Section 11 of this Agreement."

There was no reference to an uncertain minimum compensation. The Lorentz contract referred to fixed compensation clearly described elsewhere in that contract. Lorentz had actually received fixed compensation for 40 weeks at the rate of $1,250 per week, or a total of $50,000. Sheridan had not received one penny and *RKO in writing had refused to pay any compensation whatever.* (Emphasis added.)

RKO had actually abandoned the Lorentz production so as to become entitled to the benefits of the release clause. In the instant case, quite the opposite is true.

Finally, in granting a motion for summary judgment on the specific causes of action described in the *Lorentz* case, there was a definite holding that the *employer* had not been guilty of a breach of contract. In the instant case the jury found and judgment was rendered that RKO did break its contract. (Emphasis added.)

On the facts and on the difference in the two contracts, the *Lorentz* case is inapplicable.

(2) On August 17, 1949, RKO Breached the Contract.

The notice sent by RKO on August 17, 1949, was, by the verdict of the jury and the judgment rendered thereon, determined to be a repudiation and breach of the employment contract. It is here contended by Sheridan that the act of RKO in sending that notice was an election by RKO to consider the contract terminated and was inconsistent with RKO's subsequent claim that it thereafter had the right to rely on the first sentence and secure the benefit thereof in minimizing its liability for breach of contract.

In considering the matter of election, it will serve no useful purpose to discuss the distinction, if any, between an election of remedies and an election of rights. The same basic principle underlies both. A party may not exercise two alternative and inconsistent rights or remedies. The choice made by an election gives the party making it an advantage which he could not otherwise have had.

3 Williston on Contracts, Rev. Ed. (1936), Section 683;

Cf. Bierce v. Hutchins (1907), 205 U. S. 340, 346, 27 S. Ct. 524, 51 L. Ed. 828, in Note 2.

Williston gives as a classic example of election the case of a certain type of contract which is broken in the course of performance. According to that outstanding authority, the injured party in such cases has a clear choice presented to him, (a) of continuing with performance of the contract, or (b) of treating the contract as terminated by breach and refusing to go on with performance. The injured party in such a case is said to have a clear choice

between two alternative and inconsistent courses of conduct. If the injured party chooses to continue with performance he is said to have waived or lost his right to terminate the contract for the breach in question. Conversely, if the injured party chooses to terminate the contract for breach he cannot subsequently change his position and attempt to exact performance. The nature of the case is such that the choice of the one right is entirely inconsistent with the continued existence of the other.

Williston, *Op. Cit.,* Section 684.

On August 17, 1949, RKO had the opportunity to perform the contract by paying or tendering minimum compensation to Sheridan. What RKO actually did on that date was to send the notice of termination which the jury found to be wrongful. On August 17, 1949, RKO, instead of performing the contract, breached the contract. Performance and breach are entirely inconsistent with each other.

Alder v. Drudis, supra;

Alderson v. Houston, supra.

The distinction between performance of a contract and its frustration was the subject of a precedental decision in this Circuit in *Hopper v. Lennen & Mitchell, Inc.* (1944), 146 F. 2d 364, citing Williston, *opus cit.,* Vol. 2, Section 498; *Blake v. Voight* (N. Y. 1892), 31 N. E. 256, and other cases. These cases all point out the clear distinction between performance of a contract and its breach. One is the antithesis of the other.

In considering whether or not RKO made an election, the language of the notice of August 17, 1949, is instructive. RKO, after reciting the names of actors sub-

mitted as proposed substitutes for Robert Young, went on to state:

> "by reason of your failure to approve an actor to portray the leading male role in said photoplay, we will not utilize your services in said photoplay and we will not pay you any compensation whatsoever in connection therewith." [R. 132.]

When the notice was sent, Sheridan had either been guilty of a breach of the contract, or she had not been guilty of a breach of contract. If Sheridan had breached the contract, then RKO would have been correct in terminating the employment contract, thereby excusing any performance on its part. This is what the notice purported to do, completely to excuse performance on the part of RKO.

On the other hand, if, as the jury found, Sheridan had not been guilty of a breach of contract, RKO nevertheless had the right, if the first sentence were operative, to elect not to use Sheridan's services under the contract and to *perform* by paying or tendering payment at that time to Sheridan of "minimum compensation." (Emphasis added.) This is not what RKO did, nor is it what RKO said in its notice of termination.

There was no doubt in the mind of RKO on August 17, 1949, as to what it wanted to do and did. It discharged Sheridan. RKO was so confident of its position that it hesitated not, but chose to take a course of action which the jury held to be a breach of contract rather than (a) to perform completely as provided in the contract, or (b) to perform pursuant to the first sentence by paying or tendering minimum compensation to Sheridan. The promise of Sheridan contained in the first sen-

tence was to accept "minimum compensation" as performance of the contract at the time when "minimum compensation" was payable, not years later and then only after payment was enforced by the compulsion of a judgment.

On this point the case of *Cummings v. Universal Pictures Company* (1944), 62 Fed. Supp. 611, affirmed 150 F. 2d 986, is on all fours. The employer had suspended the compensation payable to the employee. The employee demanded payment of salary one week after the time when the suspension should have ended. The employer's refusal to pay was held to be a justification for the termination of the contract by the employee. We quote from 62 Fed. Supp. 611 at 629:

> "The several thousand words comprising this document deal almost entirely with the obligations imposed upon plaintiff or the rights granted to defendant, or both. Virtually the only right given to the former and the correlative obligation imposed on the latter by the contract—certainly the most important from his standpoint—involved his right to compensation and its liability to pay the same. The refusal to pay such compensation, therefore, constituted a very material breach of the agreement and not a mere trivial one."

The court went on to consider a proposed defense by the employer that its breach of the contract resulted from an excusable mistake from which default it desired to be relieved on consideration of paying to the employee such compensation as the court might find to be due him. The District Court pointed out that this defense was not interposed until after the lapse of more than six months after the agreement had been broken, during which period the employer had insisted that there was no obligation to pay any compensation to plaintiff, which position

was still maintained at the trial. Since the employer's refusal to pay compensation was arbitrary and unwarranted it was held not to be entitled to any relief in equity and the plaintiff was held justified in terminating the employment contract. (62 Fed. Supp. 611 at 630.)

Whether the first sentence is looked at as a bilateral contract in which the promises of Sheridan and RKO were an agreed exchange one for the other, or whether they may be described as concurrent conditions, makes little difference in the ultimate result. On principle and authority, the promise of Sheridan in the first sentence to accept less than full compensation was conditioned on concurrent performance by RKO of its obligation to pay less than full compensation, or minimum compensation. Performance of Sheridan's promise to take minimum compensation in lieu of full compensation could only be enforced if RKO determined to exercise its contractual right and perform its contractual obligation. Such performance was required at the time a decision was made on August 17, 1949, and not years later. Since RKO was guilty of a breach of contract, Sheridan as the injured party had a choice of remedies. She chose to treat the act of RKO as a repudiation of the contract and sued for damages. RKO had no right to limit such damages.

Alder v. Drudis, supra;

Restatement, Contracts, Sections 251, 266 and 267.

In *Minneapolis National Bank of Minneapolis v. Liberty National Bank* (1934), 72 F. 2d 434, plaintiff sought to establish a trust against the assets of defendant. Plaintiff recovered and judgment was reversed on appeal.

It appeared that plaintiff with knowledge of the facts had instituted suits against certain commission companies

which had sold the cattle the proceeds of which were deposited in defendant bank. These suits were settled. Defendant claimed that this barred and estopped plaintiff from maintaining this action. This position was upheld, the court saying at page 436:

> "But if two inconsistent remedies are available, the exercise of one by any decisive act such as the institution of a suit with full knowledge of the facts, precludes the subsequent exercise of the other. * * * Both remedies were appropriate, but they were inconsistent because the former rested upon a disaffirmance of the transaction and the latter upon ratification of it. * * * These positions are inconsistent. Taking one constitutes an estoppel against assuming the other."

As stated by the Honorable District Judge in the memorandum for counsel hereinbefore referred to:

> "* * * producer, on August 17th, may have elected to take the position that the actress had breached her contract and if, in fact, she had not breached her contract then the producer himself was guilty of an anticipatory breach by giving the notice and would be liable for damages.
>
> "It does not appear to the court that the paragraph involving the payment of minimum compensation is called into play, since the producer did not rely on it and did not attempt to fully perform as he could have done by paying the 'minimum compensation,' but instead he elected to consider the actress as having breached the contract." [Dec. 13, 1950, memo. for counsel, R. 33 at 35.]

On the law and on the undisputed facts now before the court, a ruling is imperative that RKO elected to forego any benefit it might have been entitled to under the provisions of the first sentence.

II.

"Minimum Compensation" Did Not Mean $50,000.

For this portion of the argument we will assume that the first sentence was operative. Based on such assumption, it is the position of Sheridan that the meaning of the phrase "minimum compensation" might vary depending upon circumstances as hereinafter more particularly specified. In the first part of this section, it is argued that the contract should be read in favor of Sheridan and against RKO. If this position is adopted, then the phrase "minimum compensation" as used in the first sentence is the equivalent of "flat compensation" as such phrase is used in Paragraph 6 [App. p. 3] and elsewhere in the contract, in which event the meaning to be attributed to the phrase is $150,000, not $50,000.

A. "Minimum Compensation" Meant $150,000.

The cardinal and primary rule of interpretation is that a contract is to be read so as to give effect to the mutual intention of the parties as it existed at the time of contracting.

Cal. Civ. Code, Sec. 1636.

An examination of the contract reveals, quite clearly, the mutual intention of the parties to have been the production of the picture "Carriage Entrance" by RKO with Sheridan portraying the leading female role in that picture. It not only was intended, but it was specifically provided that Sheridan would have the opportunity to earn and receive for her services "flat compensation" in the sum of $150,000, plus 10% of the profits described in Paragraph 6 as the "percentage compensation."

The agreement, in its final form, was prepared by the Legal Department of RKO. In the first sentence it is RKO, the promisor, which was to pay the minimum compensation. The language of the first sentence is, therefore, to be interpreted most strongly against RKO, the party which caused the uncertainty to exist, which is also the promisor who is presumed to be such party.

Cal. Civ. Code, Sec. 1654.

When Sheridan executed the contract it was obviously the intention of both parties that she render her services and be given the opportunity not only to receive the flat compensation of $150,000, but the percentage compensation as well. In view of this clearly expressed intention, it is a most unreasonable and strained interpretation to read the first sentence so as to give RKO, the employer, the right to breach the contract and at the same time reduce its liability for breach from the $150,000 to one-third of that amount. The first sentence, under such circumstances, must be interpreted in the sense in which RKO believed, at the time of making it, that Sheridan understood it.

Cal. Civ. Code, Sec. 1649;

Cal. Code, Civ. Proc., Sec. 1864.

When the entire contract is read in the light of the clear intent of the parties and their words are understood in their ordinary and popular sense, then "minimum compensation" must be understood as Sheridan, the promisee, understood it, to mean the equivalent of "flat compensation," $150,000, and not $50,000 which is the

equivalent of nothing in the contract. [Par. 6, 22, Ex. A; App. pp. 6, 11.]

Cal. Civ. Code, Sec. 1644;

Cal. Code Civ. Proc., Sec. 1861.

Since the first sentence is a clause introduced entirely for the benefit of RKO, it should be most strongly construed against RKO and most favorably for Sheridan. Interpretation which is in favor of natural right should be adopted as against interpretation which is against it.

Cal. Code Civ. Proc., Sec. 1866;

Cummings v. Universal Pictures Company, supra;

Wood v. Nebel, supra;

Mears v. Walley, supra.

A reading of the contract to make "minimum compensation" equivalent to "flat compensation" of $150,000 makes good sense. As was pointed out above, the purpose of the first sentence was to give RKO the contractual right either to dispense with the services of Sheridan or to abandon the production, without subjecting itself to liability for indeterminate damages or for the percentage compensation. The construction suggested by Sheridan herein effectively differentiates between the "flat compensation" of $150,000 and the "percentage compensation" of 10% of the profits. It thereby fixes the liability of RKO in a definite amount, while at the same time giving Sheridan the assurance that she will receive at least the flat compensation and be deprived only of the opportunity to get the percentage compensation. Reading the contract in this way is entirely fair to both parties and does not work a forfeiture against Sheridan or

permit the employer to perpetrate an injustice against an employee. It preserves the intent of the parties; gives effect to the entire contract; makes the contract operative and reasonable; it uses the ordinary meaning of the words; it is in keeping with Sheridan's understanding of RKO's promises; it subordinates the particular clause to the general intent of the contract and it avoids repugnancy by subordinating the first sentence to the general intent and purpose of the entire contract.

Cal. Civ. Code, Secs. 1641, 1643, 1650 and 1652; Code Sections, cited, *supra.*

B. Parol Evidence Should Have Been Admitted.

If after the application of the foregoing principles of interpretation there still remains doubt as to the meaning of the phrase "minimum compensation," then parol evidence of the circumstances surrounding the execution of the contract should have been admitted by the District Court as proposed by Sheridan.

Cal. Civ. Code, Sec. 1647;

Cal. Code Civ. Proc., Sec. 1860.

The lack of certainty as to the meaning of the phrase may be illustrated by reference to the pre-trial hearings at which this particular matter was discussed at great length with varying conclusions reached by the District Judge from time to time.

Memorandum filed December 13, 1950 [R. 33];

Memorandum filed January 18, 1951 [R. 38];

Pre-trial stipulation and order of January 30, 1951, V, items 1-5 [R. 40 at 47].

In the pre-trial order one of the issues proposed by Sheridan and excluded by the ruling of the District Court was the issue as to the meaning of the phrase "minimum compensation." [Pretrial order, IV, item 1, R. 46.]

At the trial, pursuant to said pre-trial order, Sheridan made an offer of proof as to the negotiations and circumstances surrounding the execution of the contract and as to the meaning of the phrase "minimum compensation," which offer of proof was objected to by RKO and sustained by the District Court. [R. 104.] At the trial Sheridan also made an offer of proof with reference to the issue of damages. [R. 111.]

This portion of the argument is based on the theory that the meaning of the phrase "minimum compensation" in the first sentence cannot be ascertained from the contract alone; that the District Court should place itself in the position of the parties who negotiated the contract; that to do so it is necessary for the District Court to hear the witnesses who negotiated the contract, so that all of the surrounding circumstances may be available. Only after hearing such evidence should meaning be given to the phrase "minimum compensation" which is nowhere specifically defined in the contract.

Under Rule 43(a), F. R. C. P., parol evidence should have been received by the District Court.

The rule of law with reference to parol evidence is that of the State of California which was binding on the District Court.

2 Federal Practice and Procedure, Barron and Holtzoff (1950), Section 962, page 678;

Black v. Richfield Oil Corporation (1941), 41 Fed. Supp. 988, affirmed 146 F. 2d 801, cert. den. 65 S. Ct. 1404, 325 U. S. 867;

Patterson Ballagh Corporation v. Byron Jackson Co. (1944), 145 F. 2d 786.

In the last cited case the Court referred to Section 1860 of the California Code of Civil Procedure and the leading California case of *Lemm v. Stillwater Land and Cattle Co.* (1933), 217 Cal. 474, 19 P. 2d 785, as authority for the admission of evidence concerning the circumstances surrounding the parties at the time they contracted, including the object, nature and subject matter of the agreement and the preliminary negotiations, for the purpose of placing the court in the same situation in which the parties found themselves.

Estate of Rule (1944), 25 Cal. 2d 1, 152 P. 2d 1003;

Woodbine v. Van Horn (1946), 29 Cal. 2d 95, 173 P. 2d 17;

Williston, *Op. Cit.,* Section 629;

Restatement, Contracts, Section 235(d).

The standard of interpretation to be used, both on authority and on principle, is that by which the court ascertains the ordinary meaning of the writing to the

parties of the kind who contracted at the time and place where the contract was made and with such circumstances as surrounded its making.

Williston, *Op. Cit.*, Section 607, page 1740; Section 616, page 1774, note 4;

Restatement, Contracts, Sections 320 and 227, Comment a(2);

Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., supra;

Barham v. Barham (1949), 33 Cal. 2d 416, 202 P. 2d 289.

An appellate court is not bound by the trial court's construction of a contract where the decision of that court was based solely on the terms of the written instrument.

Overton v. Vita-Food Corporation (1949), 94 Cal. App. 2d 367, 210 P. 2d 757.

The word "compensation" is used in the contract in combination with other words. In Paragraph 6 [App. 3] it is stated that Sheridan is to receive "flat compensation" in the amount of $150,000. In the same paragraph it is provided that in addition to the flat compensation Sheridan would be entitled to receive 10% of the net profits of the picture, which was called "percentage compensation." It is significant to observe how precise the draftsman was in Paragraph 6 in making clear what "flat compensation" and "percentage compensation" were.

If the draftsman in the first sentence intended "minimum compensation" to mean something other than "flat compensation," he could very easily have been as explicit there as he was in Paragraph 6.

The "flat compensation" itself was to be paid in the manner specified in that paragraph; the sum of $50,000 was expressly stated to be a payment "on account" of the flat compensation.

RKO argued that $50,000 was synonymous with minimum compensation since that was the "least" amount which Sheridan might have received under the contract.

This argument not only does violence to the plain language of the contract but is self-defeating. As is provided in this same Paragraph 6, had Sheridan's employment continued for a consecutive period in excess of 15 weeks, RKO would have been obligated to pay additional compensation at the rate of $10,000 per week. Under such circumstances, the "least" amount of money which Sheridan would have been entitled to receive under the contract would not be the sum of $50,000, but the sum of $50,000, plus $10,000 per week for each week in excess of 15. Thus, if Sheridan's services had been used continuously for a period of 20 consecutive weeks and if RKO had then elected to abandon completion of the picture under the provisions of Paragraph 29, RKO would have been obligated to pay to Sheridan on its own argument the sum of $10,000 per week for the 5 weeks beyond 15 weeks, in which event Sheridan would have been entitled to receive a total of $100,000, which would consist of $50,000 paid one week after commencement of principal photography, plus 5 weeks at $10,000 per week. "Minimum compensation" then would mean $100,000, not

$50,000 since $100,000 would be "the least compensation" which Sheridan would be entitled to receive under the provisions of the first sentence.

Looking at the contract without reference to extrinsic evidence it is not possible, fairly, to say that the phrase "minimum compensation" in Paragraph 29 must be taken to mean "least compensation," nor must the phrase "least compensation" be made the equivalent of $50,000 merely because that amount was the amount which would have been required to be paid Sheridan one week after principal photography commenced.

If the meaning of "minimum compensation" is to be found only within the four corners of the contract, then the hypothesis that minimum compensation should be equated with the phrase "flat compensation" is much more tenable since such equation would serve the purpose of eliminating percentage compensation from the amount to which Sheridan would be entitled, thereby limiting RKO's obligation to $150,000.

The motion picture industry has certain technical or trade terms or usages which are peculiar to it. This contract itself uses the phrases "flat compensation," "deferred compensation," "percentage compensation" and "minimum compensation." These are certainly technical or trade terms which could bear elucidation. The testimony of those skilled in the art or expert in the field is admissible to explain the meaning of technical or trade terms used.

Cal. Civ. Code, Section 1645, and cases cited *supra.*

Where more than one meaning may reasonably be ascribed to a phrase it may then fairly be said that the contract contains ambiguities. In such case parol evidence should be admitted to explain the contract.

Cal. Civ. Code, Section 1647, and cases cited *supra.*

It has been said by an authority as eminent as Learned Hand:

> "* * * but, in ascertaining what meaning to impute, the circumstances in which the words are used is always relevant and usually indispensable."
>
> *New York Trust Co. v. Island Oil & Transport Corp.* (1929), 34 F. 2d 655, 656.

From what has been said and from the authorities cited, it is respectfully submitted that the District Court erred in excluding Sheridan's offers of proof with reference to the meaning of the phrase "minimum compensation" and the measure of damages.

Had the court permitted such evidence to be introduced, the jury would have been in a position to find as a fact the meaning to be given to the phrase "minimum compensation" and to award damages to Sheridan based upon that meaning and upon the evidence of damages which would have been before the jury.

In view of the verdict of the jury that RKO had broken the contract, the errors of the District Court have resulted in a limitation of the damages awarded to a sum grossly disproportionate to the amount of damages actually suffered by Sheridan.

III.

The Judgment for Sheridan Should Be Affirmed and the Cause Remanded for Retrial Only on the Issue of Sheridan's Damages in Excess of $50,000.00 Only.

There was a complete and fair hearing of the issues as to whether RKO or Sheridan breached the employment contract between them. In rendering a verdict for Sheridan on RKO's counterclaim, the jury found that Sheridan did not breach the employment contract. The jury also found that RKO breached the employment contract and awarded damages to Sheridan on her complaint in the full amount permitted by the instructions given to the jury by the trial court.

A trial by jury having been had on the issues of liability for breach of contract, there is no reason to relitigate those issues.

If either of the two positions taken by Sheridan with reference to the first sentence is correct, then a retrial should be ordered for the single purpose of fixing the proper measure of damages to be awarded Sheridan as damages for RKO's breach of contract. The damages should not be limited to the sum of $50,000.00. The measure of damages is the detriment suffered by Sheridan.

It is respectfully urged by Sheridan that this court should affirm the judgment in so far as it awards Sheridan the sum of $50,000.00 plus interest and remand the cause for further proceedings in the trial court on the issue

of the liability of RKO to Sheridan in excess of the amount already awarded and in conformity with this court's opinion in the decision rendered by it herein.

Rule 59(a), F. R. C. P.;

Gasoline Products Co. v. Champlin Refining Co. (1931), 283 U. S. 494, 51 S. Ct. 513;

Board of Public Instruction v. Osburn (1939), 101 F. 2d 919, 923;

Mass. Bonding & Ins. Co. v. John R. Thompson Co. (1937), 88 F. 2d 825, 832-33;

Mutual Life Ins. Co. v. Sayre (1936), 81 F. 2d 752;

Detroit Graphite Co. v. Hoover (1930), 41 F. 2d 490;

Cf. Yellow Cab Co. v. Keane (1937), 93 F. 2d 290.

Respectfully submitted,

GANG, KOPP & TYRE,
MARTIN GANG and
MILTON A. RUDIN,
Attorneys for Appellant, Ann Sheridan.

APPENDIX.

Exhibit 1.

RKO Radio Pictures, Inc.

Agreement.

This Agreement, made and entered into at Los Angeles, California, this 29th day of April, 1949, by and between RKO Radio Pictures, Inc., a Delaware corporation, hereinafter called "Producer," and Ann Sheridan, hereinafter called "Artist,"

Witnesseth:

1. Producer hereby employs Artist as an actress, performer and entertainer to portray the leading female role in the photoplay now entitled "Carriage Entrance" to be produced by Producer. Said photoplay may hereinafter be referred to as "Carriage Entrance," or as the "Picture," or as the "photoplay." Artist shall not, however, be required to render any services pursuant hereto unless and until she has approved each and all of the following:

(a) The final shooting script of the screenplay for Carriage Entrance;

(b) The director who will direct Carriage Entrance; and

(c) The actor who will portray the leading male role in Carriage Entrance.

With respect to item (a) above, the Artist has heretofore approved the first draft estimating script entitled "Carriage Entrance," by Leopold Atlas, consisting of a one (1) page note, one hundred forty-eight (148) pages

of screenpaly and five (5) pages of synopsis covering the unfinished ending, all of which material is hereinafter referred to as the "Estimating Script," subject to such Estimating Script being completed and "polished." The Artist agrees that she shall not have the right to disapprove of the final shooting script if it is a reasonable completion and development of the Estimating Script or does not depart from the novel Carriage Entrance and the Estimating Script so as to substantially alter and diminish the importance of the Artist's role as written in the novel Carriage Entrance and in the Estimating Script.

* * * * * * * * *

4. The term of Artist's employment hereunder shall start on such date as Producer may hereafter specify to Artist in writing, which date, however, shall not be earlier than June 1, 1949, nor later than July 6, 1949. Such starting date, however, shall be subject to the completion by Artist of her services in connection with the principal photography of the photoplay originally entitled "I Was a Male War Bride." If Artist has not completed such services before the starting date specified by Producer pursuant hereto, such starting date shall automatically be postponed until the day following the completion of such services by Artist.

Said term shall continue after the starting date thereof until Artist has completed all of her services in connection with the principal photography of Carriage Entrance.

* * * * * * * * *

6. On condition that Artist fully performs all of her obligations hereunder and as payment in full for Artist's services during the first fifteen (15) weeks of the term

hereof (exclusive of periods of suspension) or such lesser period as may constitute the term hereof, and for all rights granted and/or agreed to be granted by Artist hereunder, Producer agrees to pay, or cause to be paid to, Artist the sum of One Hundred Fifty Thousand Dollars ($150,000.00) (One Hundred Thousand Dollars ($100,000.00) of which shall be deferred and payable only from the gross receipts of the Picture, as hereinafter provided), said One Hundred Fifty Thousand Dollars ($150,000.00) being hereinafter called "the flat compensation," plus a sum (herein called the "percentage compensation") equal to ten percent (10%) of the net profits derived by Producer and its successors and assigns, from the distribution of Carriage Entrance, accruing during the period of ten (10) years from and after the first general release of Carriage Entrance in the United States. Artist's compensation shall be payable as follows:

(a) Fifty Thousand Dollars ($50,000.00) on account of the flat compensation on the first regular weekly payday after the principal photography of Carriage Entrance has commenced, but in no event later than the seventh day after such photography has commenced;

(b) The balance of the flat compensation, to wit: One Hundred Thousand Dollars ($100,000.00) thereof, shall be deferred and shall be paid to Artist only from the gross receipts of Carriage Entrance accruing during the period of ten (10) years from and after the first general release of Carriage Entrance in the United States, and otherwise at the time and in the manner hereinafter set forth;

(c) The percentage compensation, and that portion of the flat compensation which is deferred, as aforesaid, shall, except as hereinafter provided, be computed and determined in accordance with the provisions of Articles 15A, 15B, 15C and 15D of the employment agreement dated April 29, 1949 between Producer and Polan Banks, a true copy of which is attached hereto, marked Exhibit "A" and by this reference made a part hereof. Wherever necessary, references to the "Producer" in said Exhibit "A" shall be deemed, for the purposes of this agreement, to be references to the Artist, and wherever necessary, references to the "Corporation" in said Exhibit "A" shall be deemed, for the purposes of this agreement, to be references to Producer. The statement in said Exhibit "A" to the effect that the Producer shall not be entitled to any share of the net profits of the Picture shall not, of course, apply under this agreement.

Producer warrants, so far as Artist is concerned, that the amounts payable under item (1) of subdivision (c) of Article 15D of said Exhibit "A" will not exceed Sixty Thousand Dollars ($60,000.00).

(d) That portion of the flat compensation which is deferred as aforesaid, shall be paid at the times and in the manner set forth in this subdivision (d), rather than at the times and in the manner set forth in Exhibit "A".

Said deferred flat compensation shall not be paid or payable to the Artist earlier than as follows:

	Payable not earlier than:
The first $20,000 thereof	January 1, 1950
The next $20,000 thereof	January 1, 1951
The next $20,000 thereof	January 1, 1952
The next $20,000 thereof	January 1, 1953
The next $20,000 thereof	January 1, 1954

That portion of the first Twenty Thousand Dollars ($20,000.00) of said deferred flat compensation which accrues from the gross receipts of the Picture prior to or during the calendar year 1950 shall be paid to the Artist in installments of Five Hundred Dollars ($500.00) per week, commencing on Producer's first regular payday during the calendar year 1950, and continuing throughout said calendar year, but only if and to the extent that said first Twenty Thousand Dollars ($20,000.00) is or becomes payable from the gross receipts of the Picture; provided, however, that if said entire first Twenty Thousand Dollars ($20,000.00) is or becomes payable during said calendar year, Producer may omit twelve (12) of said weekly payments to be made during said calendar year. As to any part of said first Twenty Thousand Dollars ($20,000.00) which does not accrue from the gross receipts of the Picture during said calendar year, the same shall be payable to the Artist at the times and in the manner set forth in Exhibit "A".

With respect to the second, third, fourth and fifth Twenty Thousand Dollars ($20,000.00) of

said deferred flat compensation, the same procedure shall be followed with respect to the calendar years 1951, 1952, 1953 and 1954 respectively.

Producer has heretofore delivered to Artist a copy of the Production-Distribution Agreement referred to in Exhibit "A", and Producer warrants that the same is a true copy thereof. The Producer agrees to deliver all statements of gross receipts to the Artist, and to make its books and records available to the Artist, and to make deposits to the account of the Artist, all at the times and in the manner provided for for the benefit of the "Producer" in Articles 3, 4, 5 and 6 of Section VII of the Production-Distribution Agreement referred to in Article 15A of said Exhibit "A".

Anything herein contained to the contrary notwithstanding, the compensation hereinbefore specified shall constitute payment in full for Artist's services only if the term of Artist's employment hereunder does not exceed fifteen (15) consecutive weeks. If said term, exclusive of any periods of suspension permitted hereunder, shall continue beyond fifteen (15) consecutive weeks, Producer agrees to pay Artist in addition to such compensation salary for the time said term continues beyond fifteen (15) weeks at the rate of Ten Thousand Dollars ($10,000.00) per week. Artist shall be paid on a pro rata basis for any incomplete week at the end of such additional time, and, for the purpose of such prorating, one day's salary shall be One Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents ($1,666.66). Salary for such additional time shall be paid to the Artist each week during the time said term continues beyond fifteen (15) weeks as aforesaid.

Artist shall not have any right, title or interest in or to Carriage Entrance, and Artist's interest in the net profits thereof shall not constitute a lien thereon or an assignment of the proceeds therefrom. Producer shall have the right to pledge, mortgage, assign, or otherwise hypothecate Carriage Entrance or the proceeds therefrom, either in whole or in part, without obtaining Artist's consent; provided, however, that no such pledge, mortgage, assignment or other hypothecation shall in any manner limit or impair any of Artist's rights hereunder. Artist acknowledges that Producer has not made, and does not now make, any representation with respect to the gross receipts or net profits to be derived or received from Carriage Entrance. Producer shall have full charge and control of the manner in which, and the terms upon which, Carriage Entrance shall be distributed, sold, exhibited and/or exploited, as well as all matters and things pertaining thereto.

* * * * * * * * *

12. If the term of Artist's employment hereunder shall begin later than the earliest date permitted therefor pursuant to paragraph 4, Artist agrees to report to Producer's studio or elsewhere when and as directed by Producer during the period (not exceeding, however, one week) prior to the starting date of said term, and to appear, assist and take part in tests, wardrobe fittings, conferences, publicity interviews, rehearsals, still photographs and the like in connection with Carriage Entrance, but Artist shall not in any event be required so to report during the period of thirty (30) days following Artist's return to Los Angeles. Artist shall not be entitled to

any compensation for services rendered pursuant to this paragraph in addition to that specified in paragraph 6.

* * * * * * * * *

20. If during the term hereof Producer shall be hampered, interrupted or interfered with in the normal conduct of its business by epidemic, fire, action of the elements, strikes, walkouts, lockouts, labor disputes, governmental law, regulation, ordinance, or order, court or executive decree or order, the act of God or of a public enemy, war, riot, civil commotion, earthquake, flood, accident, explosion, casualty, embargo, delay of a common carrier or other cause beyond its control of a similar nature, or if the production of the photoplay in which Artist is appearing or is scheduled to appear, is hampered, interrupted, interfered with or postponed by reason of any such cause, or by the illness, incapacity or refusal to perform of the director or of a principal member of the cast (other than Artist) of such photoplay, then, in any of such events, Producer may suspend this agreement during any such hampering, interruption, interference, postponement, closing or cessation. If any such suspension shall continue beyond an aggregate of four (4) weeks during the term hereof, either Producer or Artist may elect to terminate this agreement at any time thereafter while such suspension continues by notice to the other to that effect, provided, however, if Producer shall notify Artist within three (3) days after receipt of any such notice from Artist that Producer elects to terminate such suspension, such suspension shall terminate, and this agreement shall remain in effect notwithstanding Artist's notice of termination. In the event of any such termination, Producer and Artist shall each be released from all further obliga-

tion to the other under this agreement, except as set forth in paragraph 22 thereof.

21. If Artist is incapacitated or prevented from performing any or all of Artist's obligations hereunder by reason of sickness, disfigurement, impairment of voice, or by reason of any other disability, or if Artist's appearance or physical makeup shall be altered or changed to such an extent that Artist shall not have Artist's present unique and unusual value as an actress, performer or entertainer, or if Artist shall fail, refuse or neglect to perform any of Artist's obligations hereunder, or if Artist shall indicate, either personally or through Artist's representative, that Artist will at a future time fail, refuse or neglect to perform any of Artist's obligations hereunder, Producer may, at its election, suspend this agreement during any part of such incapacity, prevention, alteration, change, failure, refusal, neglect or indication of a future failure, refusal or neglect, and thereafter as hereinafter in this paragraph provided. Any such suspension due to any indication of a future failure, refusal or neglect may be continued from the time of such indication until Artist shall personally report to Producer, in the manner hereinafter provided, and thereafter, as hereinafter in this paragraph provided. No such suspension shall prejudice Producer's right to terminate this agreement at any time for any of the reasons herein specified, and shall be deemed cumulative and not exclusive of any other remedy to which Producer may be entitled at law or in equity. Producer may terminate this agreement if Artist should at any time fail, refuse or neglect to perform any of Artist's obligations pursuant hereto, or if Artist should indicate, either personally or through Artist's representa-

tive that Artist will at a future time fail, refuse or neglect to observe or perform any of Artist's obligations hereunder, or if Artist shall in any other manner breach this agreement, or if any incapacity, prevention, alteration or change as hereinbefore referred to shall continue for an aggregate of five (5) days or more. Producer shall not be liable to Artist for any compensation hereunder after this agreement shall have been so terminated, except as is set forth in paragraph 22 hereof. If Producer terminates this agreement pursuant to this paragraph 21 during the first five weeks of the term hereof (exclusive of any periods of suspension permitted hereunder), Artist shall refund to Producer such pro rata portion of the Fifty Thousand Dollars ($50,000.00) compensation theretofore received by Artist pursuant to (a) of paragraph 6 as is represented by that portion of such first five (5) weeks as occurs after such termination. For the purpose of such prorating, one week's compensation shall be taken to be Ten Thousand Dollars ($10,000.00), and any part of an incomplete week shall be calculated on the basis of One Thousand Six Hundred Sixty-six Dollars and Sixty-six cents ($1,666.66) per day. If Artist shall, in good faith, while any suspension shall continue (and provided this agreement shall not in the meantime have been terminated by Producer) personally report to Producer ready, willing and able to resume the performance of Artist's obligations to Producer's satisfaction, Producer may nevertheless continue such suspension for a period of time (but not exceeding eight (8) weeks) necessary to make preparation for the actual utilization of Artist's services; provided, however, no such further suspension shall prejudice Producer's

right to terminate this agreement at any time for any of the reasons herein specified, and shall be deemed cumulative and not exclusive of any other remedy to which Producer may be entitled at law or in equity.

22. Artist shall not be entitled to any compensation for any time during which this agreement is suspended. If this agreement is terminated pursuant to paragraph 20 or paragraph 21 and Carriage Entrance is thereafter released for general distribution with Artist appearing therein, Artist's flat compensation shall be prorated for the time the term of her employment hereunder continued (exclusive of periods of suspension) prior to such termination at the rate of Ten Thousand Dollars ($10,000.00) per week, and for the purpose of prorating any portion of an unfinished week one day's compensation shall be One Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents ($1,666.66). Any compensation theretofore received hereunder by Artist shall be credited against any such payment. Any flat compensation to which Artist may so become entitled in excess of Fifty Thousand Dollars ($50,000.00) shall be deferred and paid to Artist as set forth in (b) of paragraph 6. In the contingency provided for in this paragraph 22, Artist's right to receive the percentage compensation provided for in paragraph 6 shall not be affected.

23. Artist shall perform the services herein contracted for in a manner that shall be conducive to the best interests of Producer, and to the best interests of the motion picture industry generally, and if Artist shall at any time during the term hereof, or during the distribution of Carriage Entrance, either while rendering services hereunder or in Artists private life, commit an offense involv-

ing moral turpitude under federal, state, or local laws or ordinances, or if during any such time Artist's conduct shall offend against decency, morality, or social proprieties, or shall cause Artist to be held in public ridicule, scorn, or contempt or cause public scandal, then and upon the happening of any of such events Producer may terminate this agreement at any time within four (4) weeks thereafter and be released from all of its obligations to Artist hereunder; provided, however, that if any such event occurs after the Artist has completed all services required of her hereunder, Producer may not terminate this agreement, but shall thereafter be relieved of its obligations under Article 30 hereof.

* * * * * * * * *

29. Producer shall not be required to use Artist's services hereunder or to complete the production of Carriage Entrance, and shall be deemed to have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder. However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder.

* * * * * * * * *

In Witness Whereof, the parties hereto have executed this agreement the day and year first above written.

RKO Radio Pictures, Inc.
By Gordon E. Youngman
Vice President

Ann Sheridan
(Ann Sheridan)

Exhibit "A"

Excerpts From Agreement Between RKO Radio Pictures, Inc. and Polan Banks

Dated April ....., 1949

15A. For the purpose of computing the Producer's Deferred Fixed Compensation and determining the time and manner of payment thereof, it is hereby agreed that the provisions of:

Article 4, Section III;

All of Section V, except the third, fourth, sixth, seventh and eighth paragraphs of Article 3 thereof, and except the whole of Article 4 thereof;

Articles 1 and 2 of Section VI; and

Articles 3, 4, 5 and 6 of Section VII

of that certain agreement between the Corporation and Polan Banks Productions, Inc., a California corporation, dated January 1, 1949, herein called the "Production-Distribution Agreement", (which Production-Distribution Agreement covered the production and distribution of the Picture and which Production-Distribution Agreement has heretofore been terminated and cancelled) shall apply in all respects, and such provisions are hereby incorporated herein by reference to the same extent as if fully set forth herein, subject to the provisions of this agreement; it being understood that references to the "Distributor" contained in the Production-Distribution Agreement shall be deemed, for the purposes of this agreement, to mean the Corporation.

15B. The "negative cost" or "production cost" of the Picture shall mean the final cost of producing the Picture, computed and determined by the Corporation, except as herein expressly provided, in accordance with the method and system from time to time being used by the Corporation in determining the negative cost of its other motion pictures.

Direct costs which cannot be fixed definitely at the time incurred or which must be allocated between motion pictures shall be computed and charged to the negative cost of the Picture in the same manner as that in which such costs would have been computed and charged against similar motion pictures produced by the Corporation. If the Producer maintains that any such charge has not been computed in such manner, the matter shall be submitted within five (5) days to the certified public accountants at the time engaged to audit the books of the Corporation, and the determination of such accountants shall be binding on the parties. The charges of such accountants shall be borne by the party against whom such finding is made or shared by the parties in the proportion in which such finding is made against them.

It is expressly agreed, but without limiting the items which will constitute direct charges against the negative cost of the Picture, that the following items shall be considered direct costs, and that the charge for Studio Overhead shall be made with respect thereto:

(a) The deferred/ [O.G.H.] purchase price for the motion picture rights in the novel "Carriage Entrance" and the deferred purchase price for the screenplay of the Picture which is payable to Polan Banks Productions, Inc.;

(b) The Deferred Fixed Compensation of the Producer hereunder;

(c) That portion of the flat compensation of Ann Sheridan which is deferred and payable from the gross receipts of the Picture (as distinguished from her percentage compensation based on the net profits of the Picture);

(d) The cost of the Corporation's recording contract orchestra on the basis of the Corporation's cost therefor, plus an allocation for the unallocated salary of said recording contract orchestra, computed in the same manner as the Corporation computes said cost for the Corporation's other motion pictures, provided that the charge for the unallocated salary will not be in excess of seventy-five per cent (75%) of the charge on a cost basis of the Corporation's recording contract orchestra.

15C. In addition to the direct charges provided for above, the Corporation shall charge against the negative cost of the Picture on account of indirect costs an amount computed in all respects in the same manner as the "Studio Rental" is computed under the provisions of Article 21, Section I of the Production-Distribution Agreement. Said charge is herein called the "Studio Overhead."

It is specifically agreed that the charge for Studio Overhead with respect to the services of Ann Sheridan during the first fifteen (15) weeks of her employment in connection with the Picture will be limited to twenty-five per cent (25%) of the One Hundred Fifty Thousand Dollars ($150,000.00) flat compensation payable to her

pursuant to the Corporation's employment agreement with her; provided, however, that if the Corporation becomes obligated to pay, and pays, to Ann Sheridan any penalties for violations of required rest periods under the Corporation's agreement with Screen Actors Guild, Inc., Studio Overhead will be charged with respect thereto. Studio Overhead will, of course, be charged with respect to all pro rata compensation payable to Ann Sheridan for services rendered after the expiration of said fifteen (15) week period.

15D. After the Corporation recoups the distribution fees referred to in Article 2, Section VI of the Production-Distribution Agreement, the remainder of the gross receipts of the Picture shall be applied as follows:

(a) To reimburse the Corporation for the direct distribution expenses;

(b) To reimburse the Corporation for the negative cost of the Picture, including the charge for Studio Overhead but not including the items referred to in subdivisions (a), (b) and (c) of Article 15B;

(c) To pay the following, pari passu:

(1) Items (a) and (b) of Article 15B, it being understood that said item (a) shall be paid in full before any sums are paid with respect to said item (b);

(2) Item (c) of Article 15B.

The amounts payable under this subdivision (c) shall in no event exceed One Hundred Sixty Thousand Dollars ($160,000.00).

Any balance of the gross receipts thereafter remaining shall be considered the net profits of the Picture. If the gross receipts of the Picture shall not be sufficient during the period of ten (10) years from and after the first general release of the Picture in the United States to permit the payment of all of the foregoing items, the deficiency shall be considered to be the net loss of the Picture. The Producer shall not be entitled to any share of the net profits of the Picture nor shall he be required to contribute to the net loss of the Picture.

Whenever any reference is made in the portions of the Production-Distribution Agreement which are incorporated herein under the provisions of Article 15A, to Articles 3 or 4 of Section VI of the Production-Distribution Agreement, such references shall, for the purposes of this agreement, be deemed to refer to the provisions of this Article. The reference in subdivision (c) of Article 6, Section VII of the Production-Distribution Agreement to subdivisions (b), (d), (e) and (f) of Article 3 of Section VI thereof shall, for the purposes of this agreement, be deemed to be a reference to subdivision (b) of this Article.